



- ✓ To promote permanency for the child by insuring that placements are not disrupted by failure to comply with federal law.
- ✓ To meet the needs of Indian children by insuring that children are not removed from their Indian communities unless there is no other alternative.
- ✓ To assure Indian Tribes' participation in decision-making about and control of the placement of Indian children.

Purpose

Best Practice Recommendation:

Inquire into whether the child is an Indian child at the earliest hearing in every Child Protective Act case, and at every hearing thereafter, until the child's status as an Indian child is confirmed or denied.



- ✓ ICWA applies to any “**child custody proceeding**” involving an “**Indian child.**”
 - A **child custody proceeding** is an action in which the parent cannot demand return of the child. Included are foster care placements, termination of parental rights, pre-adoptive placements, and adoptive placements. 25 U.S.C. § 1903(1)

Best Practice Recommendation:

If the parent or Indian custodian cannot demand immediate return of the child, the proceeding is governed by ICWA.

When ICWA Applies

- A child is an **Indian child** if he or she is a member of a tribe or is *eligible* for membership in a tribe. Tribal membership requirements are determined by each individual tribe as a matter of tribal sovereignty. 25 U.S.C. § 1903(4).

Best Practice Recommendations:

- ✓ Ask the person referring the child, the parents, the Indian custodian, relatives, and the child (if the child is of sufficient age) whether the child is of Indian or native ancestry.
- ✓ Ask the person referring the child, the parents, the Indian custodian, relatives, and the child (if the child is of sufficient age) whether the child is or has been under the jurisdiction of any Tribal Court.



Timing

- ✓ A foster care placement proceeding may not be held until at least ten days after the receipt of notice as required by ICWA; the parents, Indian custodian, and/or tribe are entitled to an additional twenty days upon request. 25 U.S.C. § 1912(a)



Counsel

- ✓ Indigent parent(s) or Indian Custodian(s) have the right to appointed counsel in any removal, placement, or termination proceeding. 25 U.S.C. §1912(b).

January 24, 2007





Indian Child Welfare Act

Notice Requirements of ICWA

25 U.S.C. §§1911 & 1912

- ✓ The child's tribe has the right to notice and the right to intervene in any involuntary foster care or termination of parental rights proceeding involving an Indian child. 25 U.S.C. §1912(a).
- ✓ Notice must also be provided to child's parents and to child's Indian custodian. 25 U.S.C. § 1912(a).
 - An "Indian custodian" is any person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of an Indian child. 25 U.S.C. § 1903(6).
- ✓ Notice must be through registered mail return receipt requested, and must notify the party of the purpose and pendency of the proceeding AND of its right to intervene. 25 U.S.C. § 1912(a).
- ✓ Failure to provide notice is jurisdictional and deprives the court of ongoing authority in the case.
- ✓ If the identity or location of the parent, Indian custodian, and/or tribe cannot be determined, notice should be given to the Secretary of the Interior through the local Area Director of the Bureau of Indian Affairs.

Best Practice Recommendations:

- ✓ The BIA Guidelines suggest that notice to a tribe be provided if any of the following facts are present in a case:
 - A party, tribe, or private agency informs the court that the child may be an Indian child;
 - A public welfare agency discovers relevant information indicating that the child may be an Indian child;
 - The child believes he or she is an Indian child;
 - The child resides or is domiciled in an Indian community or the child's biological parents or Indian custodian is from an Indian community; or
 - An officer of the court has information that child is an Indian child.
- ✓ An expansive approach to notice will assist the court in accurately determining whether the child is an Indian child.
- ✓ Ensure that the court file contains proof of service.

Jurisdiction

- ✓ **Exclusive Jurisdiction** in Tribal Court if:
 - The child is an Indian child; and
 - Domiciled on the reservation.
- ✓ If an Indian Child is currently a **ward of a tribal court**, the tribal court retains **exclusive jurisdiction**, notwithstanding the residence or domicile of the child. 25 U.S.C. §1911(a).
- ✓ **Temporary Jurisdiction** may exist in state court while the child is off the reservation in order to prevent immediate physical damage or harm to the child. Such jurisdiction should terminate immediately when it is no longer necessary to prevent imminent physical damage or harm to the child.

Jurisdiction

Con't.

✓ **Transfer Jurisdiction:**

- Applies in cases involving foster care placements and actions to terminate parental rights
- May be requested by parents, Indian custodian or Indian Tribe
- A state court must transfer the case to tribal court unless it finds that there is good cause not to transfer the case or either parent objects to the transfer.

✓ **Good Cause to Decline Transfer** includes:

- The Indian child's tribe does not have a tribal court as defined by ICWA;
- The proceeding was in an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing;
- The Indian child is over twelve years of age and objects to the transfer;
- The evidence necessary to try the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses; or
- The parents of a child over five years of age are not available and the child has little or no contact with the tribe or members of the tribe.



- ✓ The burden of proof in an ICWA action (not involving termination of parental rights) is clear and convincing evidence.
- ✓ The burden of proof in an ICWA action involving termination of parental rights is beyond a reasonable doubt.
- ✓ The court must find that continued custody with the Indian parents or custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. §1912(d) & (e).

Practice Note:

Under ICWA, unfitness, abandonment, and unstable home environment are not automatic grounds for removal of an Indian child.

- ✓ ICWA requires that the finding of “serious emotional or physical damage to the child” be supported by qualified expert testimony. 25 U.S.C. §1912(e).

Practice Note

A qualified expert must have knowledge of Indian culture and traditions and be capable of giving an opinion on whether a particular Indian child is suffering emotional or physical harm because of his or her specific family situation.

- ✓ The court must find that “active” efforts to provide remedial and/or rehabilitative services to prevent breakup of the Indian family have been unsuccessful. 25 U.S.C. § 1912(d).

Practice Note:

This standard is higher than either the Idaho Child Protective Act standard or the Adoption and Safe Families Act standard and requires “energetic” and culturally relevant services.

Required ICWA Findings





Indian Child Welfare Act

Consent to Disposition of Child

- ✓ To be valid under 25 U.S.C. § 1913, a consent must be:
 - Executed in writing.
 - Recorded before a judge of competent jurisdiction, and
 - Not executed prior to or within ten days after the child's birth.
- ✓ A judge accepting a consent must certify that:
 - The terms and consequences of the consent were fully explained in detail to the parent or Indian custodian.
 - The terms and consequences were fully understood by the parent or Indian custodian in English OR the terms and consequences were interpreted into a language that the parent or Indian custodian fully understood.
- ✓ A parent or Indian custodian may withdraw his/her consent at any time prior to entry of the final decree, and upon such withdrawal, the child must be returned to the parent or Indian custodian. 25 U.S.C. § 1913.
- ✓ After entry of a final decree, a parent may withdraw consent and seek return of the child on the grounds that the consent was obtained through fraud or duress. An adoption that has been in effect for two years may not be invalidated under this provision unless it would be invalid under state law. 25 U.S.C. § 1913.

Placement Provisions

25 U.S.C. § 1915

- ✓ The child must be placed in the “least restrictive setting that most approximates the child's family and that is within a reasonable proximity to the child's home.”
- ✓ A placement is acceptable if it is within the “prevailing social and cultural standards of the Indian community in which the parent or extended family resides” or with which the parent or extended family “maintain social or cultural ties.”
- ✓ In the absence of good cause to the contrary, ICWA imposes the following placement preference in foster care situations, in order of their applicability:
 - A member of the Indian child's extended family (whether Indian or non-Indian);
 - A foster home licensed, approved, or specified by the child's tribe;
 - An Indian foster home licensed or approved by an authorized non-Indian agency; or
 - An institution for children approved by an Indian tribe or operated by an Indian organization and that is suitable to meet the child's needs.
- ✓ In adoptions, ICWA imposes the following placement preferences:
 - A member of the Indian child's extended family,
 - Other members of the Indian child's tribe; and
 - Other Indian families.

Practice Notes:

- ✓ Each tribe establishes the requirements that must be met to be a member of that tribe or to be eligible for membership in that tribe. The tribe's determination of eligibility for membership is final and is entitled to full faith and credit under §1911 of ICWA and federal case law.
- ✓ If a child was not initially identified as an Indian Child or was determined not to be an Indian Child but new information is obtained (at any point while the child remains in an out-of-home placement) that indicates previously unexplored Indian heritage, all ICWA requirement must be applied from that point forward.
- ✓ Where a parent consents to voluntary foster care placement and the parent cannot demand immediate return of the child, ICWA applies.